

DOCKET NO. 2006-1830-MSW

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IN RE THE APPLICATION OF § BEFORE THE  
MCCARTY ROAD LANDFILL, TX, L.P. § TEXAS COMMISSION ON  
NO. MSW-261B § ENVIRONMENTAL QUALITY

CHIEF CLERKS OFFICE

**APPLICANTS' RESPONSE TO REQUESTS FOR HEARING**

**TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY:**

COMES NOW McCarty Road Landfill, TX, L.P. ("McCarty"), applicant for a permit amendment, Permit No. MSW-261B, for the expansion of a Type I municipal solid waste (MSW) facility in Harris County, Texas, by and through its attorney, and submits this its Response to Requests for Hearing pursuant to 30 TEX ADMIN CODE § 55.209(d), the rules of the Texas Commission on Environmental Quality (the "TCEQ" or the "Commission") and shows the following:

**I.**

**BACKGROUND**

The McCarty Road Landfill is a Type I municipal solid waste landfill located at 5757A Oates Road, Houston, Harris County, Texas. The landfill was permitted in 1976 and now serves the solid waste disposal needs of the City of Houston and surrounding areas, consistent with the Houston-Galveston Area Council's SOLID WASTE MANAGEMENT PLAN FOR THE H-GAC REGION. In order to continue to provide solid waste management and disposal services, McCarty has applied for a vertical expansion to create an additional approximately 10.9 years of disposal capacity.

A Public Meeting regarding the proposed expansion was held on December 2, 2004. After administrative and technical review, the Executive Director issued his Preliminary Decision and Draft Permit on October 24, 2004. As described in the Notice of Setting for the Commission Agenda dated February 14, 2007, the Office of the Chief Clerk has forwarded six letters requesting a hearing. Those who submitted these requests represent four distinct groups.<sup>1</sup>

## II.

### LEGAL AND ORGANIZATIONAL BASIS FOR RESPONSE

Section 55.211(c) of the TCEQ rules provides that a request for a contested case hearing shall be granted if the request is made by an affected person and "(A) raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter... and that are relevant and material to the commission's decision on the application; (B) is timely filed with the chief clerk; (C) is pursuant to a right to hearing authorized by law; and (D) complies with the requirements of §55.201..."

Section 55.209(e) of the TCEQ rules provides that "[r]esponses to hearing requests must specifically address: (1) whether the requestor is an affected person; (2) which issues raised in the hearing request are disputed; (3) whether the dispute involves questions of fact or of law; (4) whether the issues were raised during the public comment period; (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing...; (6) whether the issues are relevant and material to the decision on the application; and

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<sup>1</sup> These groups ("Requestors") are:

- 1) Northeast Environmental Justice Association ("NEEJA"), which submitted two requests, dated February 10, 2005 and October 13, 2006 respectively.
- 2) A group of individuals ("Individuals") represented by the same attorney representing NEEJA, which submitted one request, dated October 13, 2006.
- 3) Harris County Public Health & Environmental Services ("HCPHES"), which submitted one request dated October 16, 2006.
- 4) A group of business entities (collectively "Weingarten"), which submitted two requests, dated February 11, 2005 and October 13, 2006 respectively.

(7) a maximum expected duration for the contested case hearing." Basically, responses to hearing requests are required to address most of the elements that must be in a hearing request for it to be referred to SOAH.

This response is organized to correspond to these requirements. Section III discusses a) whether each hearing Requestor is an affected person, b) what was considered in determining whether each issue raised by the hearing Requestors was disputed and whether it was an issue of fact or law, c) whether each issue was based on a public comment and, if so, whether the comment was withdrawn, d) what was considered in determining whether each issue raised by the hearing requestors was relevant and material and e) the expected duration of the hearing.

Section IV contains a quick reference chart similar to the reference sheet that is prepared for the Commissioners' consideration of the issues at the Agenda hearing, which will hopefully assist the Commissioners and staff synthesize the thirty issues raised by the hearing requestors in a concise format. This chart, sorted by hearing requestor, lists each issue raised in the hearing requests in the order and in the language of the hearing requestor.<sup>2</sup> The chart then states whether that issue is appropriate for referral to SOAH and for those issues which are not, the chart provides a short reference to the reason that the issue should not be referred. For those issues which are appropriate for referral to SOAH, the chart references the corresponding issue in Table 2, Section VII, which provides suggested language for each issue to be referred.

For those issues that should not be referred to SOAH, Section V explains why each issue is not appropriate for referral.

Section VI addresses HCPHES' request for reconsideration.

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<sup>2</sup> The issues are quoted from the requestors' letters, except Weingarten's issues. Due to the length of Weingarten's issues, they were condensed, but every attempt was made to capture the essence of each comment.

Section VII contains the prayer, including Table 2 referenced above. This table includes a list of issues that should be referred, in appropriate regulatory language for referral. Several of the issues which were requested were substantially the same issue, and so were consolidated into one issue for referral where appropriate. For the reader's convenience, Table 2 provides a reference to each requested issue that the suggested issue covers, which is easily identifiable with the Requestor.

Finally, for the Commissioner's consideration, an Exhibit is attached which provides a short discussion of some of the factual issues relevant to those issues that should be referred to SOAH. This Exhibit is intended to be helpful by providing a fuller understanding of these issues than is available from the Requests for Hearing.

### III.

#### DISCUSSION OF RESPONSE REQUIREMENTS

A. Is the requestor an affected person? (§55.209(e)(1))

Section 55.203(a) of the TCEQ rules provides that "an affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest." In determining whether an individual is an affected person, the TCEQ rules require consideration of "all factors...including, but not limited to, the following: (1) whether the interest claimed is one protected by the law under which the application will be considered; (2) distance restrictions or other limitations imposed by law on the affected interest; (3) whether a reasonable relationship exists between the interest claimed and the activity regulated; (4) likely impact of the regulated activity on the health and safety of

the person, and on the use of property of the person; [and] (5) likely impact of the regulated activity on use of the impacted natural resource by the person..."<sup>3</sup>

A governmental entity may be an affected person if it has authority under state law over issues raised by the application,<sup>4</sup> considering "their statutory authority over or interest in the issues relevant to the application."<sup>5</sup>

A group or association may request a contested case hearing only if it meets all three of the following requirements: 1) one or more of its members would otherwise have standing to request a hearing, 2) the interests that the group seeks to protect are germane to the organization's purpose and 3) neither the claim asserted nor the relief requested requires the participation of the individual members.<sup>6</sup>

Table 1 lists the hearing requestors, and states whether each is an affected person/entity. Following the table is a more detailed explanation regarding the affected person status of each hearing requestor.

**Table 1 – Affected Person Status**

Hearing Requestors Name		Affected Person? (Yes or No)
1	NEEJA	No, subject to receipt of additional information.
2	Individuals represented by Martina Cartwright	Yes, should be aligned.
3	HCPHES	Yes.
4	Weingarten	Yes.

NEEJA

From the information provided in its hearing request, NEEJA has not shown that it qualifies for associational standing to request a contested case hearing because it failed to

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<sup>3</sup> §55.203(c).

<sup>4</sup> §55.203(b).

<sup>5</sup> §55.203(c)(6).

<sup>6</sup> §55.205(a).

provide sufficient evidence that it is a legitimate organization with requirements for membership organized for a proper purpose. Therefore, pursuant to §55.205, an explanation of how NEEJA meets the requirements for affected person status is requested.

#### Individuals

Some of the Individuals reside as far as 2.2 miles from the boundary of the landfill. However, McCarty has no objection to any or all of the Individuals being granted affected person status, provided those individuals are aligned with NEEJA, if NEEJA is granted associational standing, or aligned together if NEEJA is not granted associational standing. Such alignment is appropriate, since the Individuals and NEEJA have been represented by common counsel in this matter and have expressed identical issues in their hearing requests, showing that their interests are aligned. Should any Individual seek affected person status separate from the aligned group, McCarty reserves the right to object to their status as affected persons.

#### HCPHES

HCPHES meets the requirements for affected person status and should be admitted.

#### Weingarten

Weingarten is comprised of a collection of several entities, as described in their two hearing requests. These entities have not provided sufficient information in their hearing request to determine whether each qualifies for affected person status. However, McCarty has no objection to any or all of these entities being granted affected person status, provided they are aligned. This alignment is appropriate since they have expressed in their comments and their hearing requests that their interests are aligned, and they have been represented by common counsel in this matter.

B. Are the issues raised in the hearing request disputed questions of fact? (§55.209(e)(2, 3))

Section 50.115(c)(1) states that the "commission may not refer an issue to SOAH for a contested case hearing unless the commission determines that the issue: (1) involves a disputed question of fact..." Several of the issues raised by Requestors fail to raise a disputed issue of fact.

Vagueness

Some issues are stated by the Requestor so broadly and/or vaguely as to not identify any specific facts in dispute. Section 55.201(d)(4) requires that the hearing request, "to the extent possible, specify...the factual basis of the dispute." Section 55.211(b)(3)(A) states that the factual issues to be referred to SOAH be specific. Vague and broad issues, such as general allegations that the application may not be adequately protective of human health and the environment, fail to meet the intent of §55.211 to narrow the issues to be referred to SOAH. By stating such vague issues, no specific facts are placed in dispute and virtually any issue may be brought into the SOAH hearing as relevant to the broader issue. As such, vague issues fail to raise a disputed issue of fact.

Collateral Attacks on the Rules

Section 330.1 provides that "[t]he regulations promulgated in this chapter cover all aspects of municipal solid waste management...and are based primarily on the stated purpose of Texas Civil Statutes, Health and Safety Code, Chapter 361..." The stated public policy underlying the regulations for municipal solid waste (30 TEX. ADMIN. CODE Ch. 330) is to protect the health of the people and the environment by controlling the management of solid waste. As intended by the Commission in the promulgation of the rules, compliance with Ch.

330 in the design, construction, and operation of a landfill provides adequate protection for human health and the environment.

Some of the issues raised by the Requestors do not allege any failure of the application to comply with the rules. Instead, they complain generally about alleged adverse health impacts, for example. Such issues are in reality a collateral attack on the sufficiency of the Commission's rules and regulations, and not specific allegations or issues regarding the McCarty Road Landfill's permit application. When not supported by any specific allegation of failure to comply with the Commission's regulations, these types of issues are not sufficiently specific to provide identifiable fact issues that can be referred to SOAH.

SOAH's jurisdiction is limited to whether an application meets the criteria designed to protect public health and the environment as established by the TCEQ and the Legislature. If the Requestor believes that those criteria are not stringent enough, then the Requestor must seek relief at the Legislature or through rule-making at the TCEQ.

#### Questions of law or policy

A requested issue fails to raise a disputed issue of fact where the only issue raised is a question of law or policy. Such questions are not appropriate for referral to SOAH.<sup>7</sup> Where a hearing requestor asks to refer an issue based on what the Requestor wishes the rules to be, rather than a failure of the application to meet the existing rules, they have raised an issue of law or policy rather than an issue of fact. Such issues are not appropriate for referral to SOAH.

C. Were the issues raised during the public comment period and not solely in a public comment withdrawn by the commenter in writing? (§55.209(e)(4, 5))

Section 50.115(c)(2) states that the "commission may not refer an issue to SOAH for a contested case hearing unless the commission determines that the issue: ...(2) was raised during

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<sup>7</sup> See §55.211(b)(3)(B).



the public comment period..." The Commission received a hearing request from the City of Houston, dated March 11, 2005, which was rescinded by letter dated March 29, 2005. Therefore, this request is not addressed in this response. McCarty is not aware of any other issues requested in the hearing requests that were not raised during the public comment period, or that were withdrawn by the commenter in writing.

Both NEEJA and Weingarten submitted a request for a hearing during the comment period, followed by a second hearing request after the close of the comment period but during the hearing request period. Each of the issues requested by NEEJA in its first request were brought forward in NEEJA's second request, either verbatim, or in substantially similar form. Many of the issues raised by Weingarten in its first request were also raised in its second request in some form. In Weingarten's case, only the issues raised in the latest letter, submitted after the comment period closed, are addressed herein. It is presumed that issues raised in the earlier request were resolved in the response to comments if they were not brought forward into the subsequent letter.<sup>8</sup>

D. Are the issues relevant and material to the decision on the application? (§55.209(e)(6))

Section 50.115(c)(3) states that "the commission may not refer an issue to SOAH for a contested case hearing unless the commission determines that the issue:...(3) is relevant and material to the decision on the application." Since the Commission may not base a decision on

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<sup>8</sup> All but four of the issues raised in Weingarten's first request were either brought forward in Weingarten's second request in some form, or are substantially similar to issues raised by another hearing requester. These four issues, which McCarty has not responded to in this response, are: 1) whether leachate or gas condensate will be correctly managed in a way that protects Weingarten, 2) whether the cost estimates and financial assurance are sufficient to protect Weingarten during closure and post-closure, 3) whether the functions and minimum qualifications for each category of key personnel to be employed at McCarty will be sufficient to protect Weingarten, and 4) whether McCarty will maintain protections against fire in the expanded or existing area sufficient to protect Weingarten.

factors not specifically enumerated by applicable statutes, rules, or regulations in making a decision on the application, such issues are not relevant and material.<sup>9</sup>

The TCEQ has historically assessed the relevancy of an issue by considering whether that issue could form the basis of a necessary finding of fact or conclusion of law, and therefore whether or not the permit should be issued. If the issue is extraneous to that decision, it is not relevant or material to the decision on the application and should not be referred.

Simply put, the Commission should ask whether an applicant's failure to sustain its burden of proof on an issue could result in denial of the application. If so, then the issue is relevant. If not, then the issue is not relevant.

E. What is the appropriate maximum expected duration for the contested case hearing? (§55.209(e)(7))

Responses to hearing requests must address the maximum expected duration of the hearing from the first day of the preliminary hearing to the issuance of the proposal for decision. McCarty suggests that, given the number and complexity of the parties and issues, eleven (11) months is an appropriate schedule.

#### IV.

#### QUICK REFERENCE CHART

The following chart is only intended to provide a quick reference for the reader as to what issues should and should not be referred. Column 1 provides a reference number for each issue.<sup>10</sup> Column 2 provides each issue raised by a Requestor, quoted from the request.<sup>11</sup> Column 3 gives a yes or no answer as to whether the issue should be referred to SOAH, and where that

<sup>9</sup> *Starr County v. Starr Indus. Servs., Inc.*, 584 S.W.2d 352, 356 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.).

<sup>10</sup> The first digit of the reference number indicates the Requestor. N\* indicates NEEJA's and the Individual's issues (which are identical), H\* indicates HCPHES' issues, and W\* indicates Weingarten's issues.

<sup>11</sup> Except Weingarten's issues. Due to the length of Weingarten's issues, they were condensed, but every attempt was made to capture the essence of each comment.

answer is no, provides a brief explanation as to why the issue should not be referred; these are explained in greater detail and supported in Section V. Where an issue is recommended for referral, the final column contains a reference to the issue number in Table 2 (Section VII) that encompasses that issue. Note that in some cases, several issues as framed by the Requestors fall under one issue to be referred.

**Commissioners' Hearing Request Considerations  
McCarty Road Landfill, TX, LP Proposed MSW Permit No. 261B**

<u>Issue as framed by Requestor</u>		<u>Refer to SOAH?</u>	<u>Refer as:</u> <sup>12</sup>
<b>NEEJA / Individuals (10/13/06)</b>			
N1	"Significant increase of storm water run-off from the site"	Yes.	1
N2	"Potential vector infestation (e.g. rodents, mosquitoes, etc.) from a substantial increase – an estimated 400,000 tpy – in waste expected to be received by the facility over the next decade or so"	Yes.	2
N3	"Exacerbation of existing groundwater contamination caused by the facility"	Yes.	3
N4	"Increased [sic] in rank and stinking odors from the facility, including nuisance odors"	Yes.	5
N5	"Inadequate control and monitoring of harmful gases from the landfill"	Yes.	6
N6	"Increase in air emissions, including particulates, from a significant increase in truck traffic to the site"	No. This issue is not relevant and material to the MSW permit application.	
N7	"Extremely high potential for slope failure. The proposed final landfill height is expected to increase (198 ft from its 188 ft height), which is much higher than any prior design approved for Harris County. The permit amendment does not present adequate slope stability analyses to assure the general public that the landfill will not experience slope stability failures"	Yes.	7
N8	"Increased potential for windblown debris from landfill, including windblown debris from the slope of the landfill during stormy weather"	Yes.	8

<sup>12</sup> See Table 2, Section VII.

<u>Issue as framed by Requestor</u>		<u>Refer to SOAH?</u>	<u>Refer as:</u> <sup>12</sup>
N9	"Adverse health impacts on the local community (e.g. increase in cancer, respiratory illness, allergies, etc.)"	No. Issue is too vague and therefore fails to identify a specific issue of fact for referral. It also constitutes a collateral attack on the rules.	
N10	"Loss of natural trees and impairment of the growth and development of animals because of increased groundwater contamination, storm water run off"	Yes. But the issue's factual dispute is encompassed by issues 3 and 4 as suggested in Section VII.	3, 4
N11	"Impairment of the health, growth and development of native and domestic animals due to the attraction and infestation of avian, mammalian, and reptilian animal vectors"	Yes. But the issue's factual dispute is encompassed by issue 2 as suggested in Section VII.	2
N12	"Increased risk of flooding as a result of diminishing trees and vegetation growth and development"	Yes. But the issue's factual dispute is encompassed by issue 1 as suggested in Section VII.	1
N13	"Increased contamination of nearby standing waters already contaminated by past leaching of chemical residue"	Yes. But the issue's factual dispute is encompassed by issue 4 as suggested in Section VII.	4
<b>HCPHES (10/16/06)</b>			
H1	"Whether the proposed vertical expansion will protect groundwater and surface water quality"	Yes. But the issue's factual dispute is encompassed by issues 3 and 4 as suggested in Section VII.	3, 4
H2	"Whether the draft permit complies with the intent of Subtitle D and Tex. Health and Safety Code, Chapter 361" ("While state rules related to Subtitle D requirements to expand this landfill may allow the vertical expansion, allowing a vertical expansion when there is known uncontained groundwater contamination in the northeast portion of this site adjacent to Greens Bayou does not meet the state's policy and purpose.")	No. This issue raises a question of policy, not a disputed question of fact.	

<u>Issue as framed by Requestor</u>		<u>Refer to SOAH?</u>	<u>Refer as:</u> <sup>12</sup>
H3	"Whether the draft permit is protective of human health and the environment"	No. Issue is too vague and fails to identify a specific issue of fact for referral. It also constitutes a collateral attack on the rules.	
<b>Weingarten (10/13/06)</b>			
W1	<u>Odor Impacts:</u> Requestor asserts that "odor problems at the Landfill will be exacerbated by the expansion and that additional odor control measures which could have been made to existing landfill operations at the site but have not, will be insufficient to address the odor problems."	Yes.	5
W2	<u>Impacts to Property and Business Interests:</u> Requestor states that "property and business interests...that are located immediately adjacent to the Landfill will likely suffer business, economic and environmental problems if the Amendment Application is granted." and that the Commission should consider those impacts.	No. This issue is not relevant and material to the MSW permit application.	
W3	<u>Impacts to Pre-Subtitle D Landfill Cells and Liner Systems:</u> Requestor expresses concern regarding "the impacts of the proposed expansion on the pre-Subtitle D landfill cells and liner systems, to the extent any exist."	Yes. But the issue's factual dispute is encompassed by issue 3 as suggested in Section VII.	3
W4	<u>Impacts to Human Health and the Environment:</u> Requestor asserts that the "Landfill's vertical expansion combined with its existing problems – especially groundwater problems – could negatively impact the health and safety" of its employees and those with whom it does business. Specifically, the Requestor expressed concern that "the additional weight and leachate generated from the proposed expansion will only serve to increase the stress on liner systems."	Yes. But the issue's factual dispute is encompassed by issue 3 as suggested in Section VII.	3

<u>Issue as framed by Requestor</u>		<u>Refer to SOAH?</u>	<u>Refer as:<sup>12</sup></u>
W5	<u>Impact from Run-off:</u> Requestor is concerned that the "Landfill's vertical expansion will impact runoff." Requestor further states that "the Applicant must demonstrate that 'natural drainage patterns will not be significantly altered as a result of the proposed landfill development'" and that the "Applicant has not complied with §330.56(4)(A)(iv) because the Applicant has failed to demonstrate that natural drainage patterns will not be significantly altered." <sup>13</sup>	Yes. But the issue's factual dispute is encompassed by issue 1 as suggested in Section VII.	1
W6	<u>Applicant's Compliance History:</u> Requestor states that the "Applicant's compliance history remains a concern" and "should be fully explored and offered into evidence at a public hearing." Requestor "is also interested in examining the Applicant's compliance history at other facilities besides the Landfill." Finally, Requestor states that the TCEQ did not "fully consider environmental violations documented by local governmental entities" and that this "is a failure to truly consider and evaluate the Applicant's compliance record."	Yes.	9
W7	<u>Consideration of Protection for Maximum Life of Landfill:</u> Requestor states that the "increase [in] the capacity of the Landfill" and "the estimated site life" could "negatively impact" the Requestor by "increasing the sheer volume of garbage located next to" it and "lengthening...the time that the Landfill will operate." Requestor is concerned whether "the necessary protections for the <i>maximum</i> life of the Landfill have been considered and properly addressed."	No. Part of this issue is too vague, and so does not raise a disputed issue of fact. The remainder of the issue is not relevant and material.	
W8	<u>Soil Importation:</u> Requestor asserts that the "increase [in] the number of truckloads of garbage that pass thorough the neighborhood" will have a negative effect on "the local environment" and the "use of its Property." Requestor also states that it estimates that "soil importation for daily cover and final cover could in fact increase traffic by over 20 percent."	Yes.	10

<sup>13</sup> For the Commissions' convenience, McCarty notes that the correct rule citation is §330.56(f)(4)(A)(iv). Note that all rule references to Chapter 330 are to the rules in effect at the time that the application was submitted.

	<u>Issue as framed by Requestor</u>	<u>Refer to SOAH?</u>	<u>Refer as:</u> <sup>12</sup>
W9	<u>Truck Traffic</u> : Requestor asserts that the "Applicant will move the entrance from its current facility access road to Mesa Drive. This will cause a significant increase in traffic of garbage trucks and tracking of mud" on the streets. Requestor alleges that "soil importation could increase traffic over 20%."	Yes.	10, 11
W10	<u>Closure and Post-Closure Plan</u> : Requestor expresses concern "about the closure plans for the Landfill" in that "the limited shallow, lateral monitoring for groundwater will [not] provide assurance and protection for adjacent properties."	No. This issue is a collateral attack on the rules and therefore does not raise a disputed question of fact.	
W11	<u>Landfill Gases</u> : Requestor questions "whether the Landfill can control migration of landfill gases" and "feels strongly that gas migration issues at the Landfill should be finalized <i>before</i> a landfill expansion is approved or be addressed as part of a proceeding on this application."	Yes. But the issue's factual dispute is encompassed by issue 6 as suggested in Section VII.	6
W12	<u>Air Issues</u> : Requestor states that "[r]ecent amendments to the municipal solid waste regulations, although not directly applicable to this Application, show that air issues and concerns are relevant to this type of application." and expresses concern "regarding air quality issues relating to the Landfill."	No. This issue is not relevant and material to the MSW permit application.	
W13	<u>Slope Stability</u> : Requestor expresses "concerns regarding the stability of the Landfill; in particular, "that the unique stability problems associated with geosynthetic cover components have not been adequately considered."	Yes.	7
W14	<u>Groundwater Contamination</u> : Requestor expresses concern that the "vertical expansion would serve to exacerbate...existing groundwater problems" and "may also negatively impact the health and safety" of Requestor's employees and those who do business with Requestor. Requestor states that it "is not confident that the Applicant has adequately controlled the source or identified the scope of the releases into the groundwater, as required by the applicable regulations."	Yes. But the issue's factual dispute is encompassed by issue 3 as suggested in Section VII.	3

V.

**DISCUSSION OF ISSUES NOT APPROPRIATE FOR REFERRAL**

Below is a discussion of those requested issues that are not appropriate for referral to SOAH. The first column in the heading of each issue identifies the issue by hearing Requestor and requested issue number corresponding to the Quick Reference chart. The second column quotes the issue as requested by the hearing Requestor. The third column states under what requirement the issue fails. Below each issue is a discussion of why that issue should not be referred.

**Issue: Air emissions from mobile sources**

N6	"Increase in air emissions, including particulates, from a significant increase in truck traffic to the site"	No. This issue is not relevant and material to the MSW permit application.
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Emissions from mobile sources are regulated under separate rules and regulations, and not the MSW rules. Therefore, because air emissions from mobile sources are not regulated under the MSW rules, this issue is not relevant and material to the MSW permit being sought.

**Issue: Health Impacts**

N9	"Adverse health impacts on the local community (e.g. increase in cancer, respiratory illness, allergies, etc.)"	No. Issues are too vague and fail to identify a specific issue for referral. They also constitute collateral attacks on the rules.
H3	"Whether the draft permit is protective of human health and the environment"	

These issues are nothing more than a collateral attack on the rules. The applicant's burden of proof is to demonstrate that it has complied with the MSW rules. In evaluating whether an application is protective of human health and the environment, the Commission and SOAH must consider whether the applicant has met its burden with regard to each of the specific rules. If the applicant meets that burden, the landfill is, by definition, protective of human health



and the environment. Consequently, a vague and broad challenge that simply recites a belief that the facility will not be protective of human health and the environment can not constitute a referable issue. If the Requestors believe that the criteria in the rules are not stringent enough, they should either seek relief at the legislature or petition the TCEQ to institute a rulemaking.

In addition, these issues are too vague to raise any identifiable issues of fact which McCarty can dispute. The policy behind §55.201 is to narrow the issues to be referred to SOAH. Referral of such broad and vague issues would fail to narrow the issues at all, and would not provide McCarty with notice of the issues relevant to the hearing.

**Issue: Expansion over pre-Subtitle D areas**

H2	"Whether the draft permit complies with the intent of Subtitle D and Tex. Health and Safety Code, Chapter 361" ("While state rules related to Subtitle D requirements to expand this landfill may allow the vertical expansion, allowing a vertical expansion when there is known uncontained groundwater contamination in the northeast portion of this site adjacent to Greens Bayou does not meet the state's policy and purpose.")	No. This issues raises a question of policy, not a disputed question of fact.
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The requested issue is a pure question of policy, and not a disputed question of fact. The applicable rules clearly allow for a vertical expansion over a pre-subtitle D landfill.<sup>14</sup> The requestor states that "[w]hile state rules related to Subtitle D requirements to expand this landfill may allow the vertical expansion, allowing [such] a vertical expansion...does not meet the state's policy and purpose." If the requestor wishes to affect a change in law or policy, the appropriate forum is to address the legislature, or to request a rulemaking, rather than in a specific permitting action.

While the issue of policy that the Requestor has requested is not appropriate for referral, McCarty calls the Commission's attention to issue number 3 (Table 2, Section VII), which McCarty has agreed should be referred. This issue regarding groundwater contamination will

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<sup>14</sup> See §330.200(a) (requiring Subtitle D liners for "new" units and "lateral expansions" and not vertical expansions).

likely provide the Requestor with an opportunity to explore concerns regarding the liner's ability to function under the proposed expansion, regardless of referral of this specific issue.

**Issue: Property values**

W2	<u>Impacts to Property and Business Interests:</u> Requestor states that "property and business interests...that are located immediately adjacent to the Landfill will likely suffer business, economic and environmental problems if the Amendment Application is granted." and that the Commission should consider those impacts.	No. This issue is not relevant and material to the MSW permit application.
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The Commission may not consider standards not specifically enumerated by applicable statutes, rules, or regulations in making a decision on the application.<sup>15</sup> As noted in the Executive Director's response to comments (comment 34), and in the Executive Director's response to comments in previous matters,<sup>16</sup> the TCEQ has acknowledged that it has no authority to consider property values when reviewing MSW permit applications. The Commission has supported this position by not referring property value issues when they have been requested.<sup>17</sup>

"Business interests," like property values, are not enumerated in the applicable statutes, rules, or regulations, and so are outside the TCEQ's authority. Because the TCEQ has no authority to consider property values and business interests in an MSW application, the requested issue is not relevant and material to the application, and should not be referred to SOAH.

<sup>15</sup> See *Starr County v. Starr Indus. Servs., Inc.*, 584 S.W.2d 352, 356 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.).

<sup>16</sup> See Tex. Comm'n on Enviro. Quality, *Executive Director's Response to Public Comments Concerning Application by Panama Road Landfill, TX, LP*, MSW Permit No. 2296, p. 8 (Nov. 1, 2002); Tex. Nat. Res. Conservation Comm'n, *Executive Director's Response to Public Comments Concerning Application by City of Shamrock MSW Permit No. 2281*, Docket No. 2001-0702-MSW pp. 13-14 (May 11, 2001); Tex. Nat. Res. Conservation Comm'n, *Executive Director's Response to Hearing Requests, Hereford MSW Permit No. MSW 2289*, Docket No. 2002-0653-MSW p. 12 (June 3, 2002).

<sup>17</sup> Id.

**Issue: Landfill Life**

W7	<u>Consideration of Protection for Maximum Life of Landfill:</u> Requestor states that the "increase [in] the capacity of the Landfill" and "the estimated site life" could "negatively impact" the Requestor by "increasing the sheer volume of garbage located next to" it and "lengthening...the time that the Landfill will operate." Requestor is concerned whether "the necessary protections for the <i>maximum</i> life of the Landfill have been considered and properly addressed."	No. Part of this issue is too vague, and so does not raise a disputed issue of fact. The remainder of the issue is not relevant and material.
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Whether the landfill will operate for more or less than 10.9 years is not material and relevant to the permitting process. The rules require only that an "estimate" of the operating life of the site be provided.<sup>18</sup> The permit is based on the volume and final contour and is issued for the actual life of the site.<sup>19</sup> Because the permit is issued for the actual life of the site, the site is subject to the rules for its actual life, not only the life-span estimated in the application. Thus, even if the Requestor was able to prove that the landfill would be open for longer than the estimate, this would not constitute a basis for denying the application, and thus the issue is not material and relevant. The issue therefore should not be referred to SOAH.

In addition, this issue is too vague to raise any identifiable issues of fact which McCarty can dispute. A vague reference to "protections" is not a specific issue of fact that is appropriate for referral to SOAH.

**Issue: Closure and Post Closure**

W10	<u>Closure and Post-Closure Plan:</u> Requestor expresses concern "about the closure plans for the Landfill" in that "the limited shallow, lateral monitoring for groundwater will [not] provide assurance and protection for adjacent properties."	No. This issue is a collateral attack on the rules and therefore does not raise a disputed question of fact.
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This issue does not allege that the application's closure or post closure plan for groundwater monitoring fails to meet the requirements of the rules. If the requestor believes that

<sup>18</sup> §330.55(a)(4).

<sup>19</sup> §330.63(a).

the criteria in the rules are not stringent enough, it should either seek relief at the legislature or petition the TCEQ to institute a rulemaking. This issue, like the issues questioning whether the application is protective of human health and the environment (H3), is a collateral attack on the adequacy of the rules, since it questions whether the rules provide sufficient protection.

**Issue: Air Quality from Landfill**

W12	<u>Air Issues:</u> Requestor states that "[r]ecent amendments to the municipal solid waste regulations, although not directly applicable to this Application, show that air issues and concerns are relevant to this type of application." and expresses concern "regarding air quality issues relating to the Landfill."	No. This issue is not relevant and material to the MSW application.
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Under the rules applicable to this application, air issues are not relevant and material. Air issues at the landfill are regulated under a separate, standard air permit (Standard Permit Registration No. 54395 and General Operating Permit No. O-01454). Because there is a separate process for evaluation of air emissions from landfills, the issue is not material and relevant to this application and this issue should not be referred to SOAH.

## VI

### REQUEST FOR RECONSIDERATION

The request for contested case hearing from HCPHES dated October 16, 2006 also included a request for reconsideration. HCPHES's request provides no reasons in support of its request for reconsideration beyond those given for its request for a contested case hearing. McCarty respectfully requests denial of this request for reconsideration.

## VII.

### PRAYER

WHEREFORE, PREMISES CONSIDERED, McCarty respectfully requests that the Commission grant the hearing requests of HCPHES, Weingarten, and the Individuals as affected

persons and deny, the hearing request of NEEJA pending receipt of information showing that NEEJA satisfies the requirements for associational standing to request a contested case hearing. McCarty also respectfully requests that the Commission deny HCPHES' request for reconsideration.

McCarty accepts that certain issues raised by the requesters are disputed fact questions, and therefore should be properly referred to SOAH. McCarty requests that these issues be stated in terms that conform to the requirements set out in the MSW regulations so that the parties, SOAH, and ultimately the Commissioners can clearly understand the burden of proof required. It is not in any party's interest to have confusion as to what the referred issues encompass. Historically, the most effective way to ensure that the application is considered against the requirements of the rules is to state the issues, to the extent possible, in the language of the rules. McCarty therefore respectfully requests that only the issues described in Table 2 be referred.

**Table 2 – Issues for Referral**

Issue		Requestors	Issues
1	Whether the existing drainage patterns have not been significantly altered as required by §330.56(f)(4)(A)(iv) and Regulatory Guidance Document RG-417 (2002). <sup>20</sup>	NEEJA, Individuals, Weingarten	N1, N12, W5
2	Whether the application provides for control of vectors as required by §330.126.	NEEJA, Individuals	N2, N11
3	Whether the application is adequately protective of groundwater as required by §330.200-206.	NEEJA, Individuals, HCPHES, Weingarten	N3, N10, H1, W3, W4, W14
4	Whether the application is adequately protective of surface water as required by §330.55(b)(1).	NEEJA, Individuals, HCPHES, Weingarten	N19, N13, H1
5	Whether the application provides an odor management plan that complies with §330.125(b) and §330.133(a).	NEEJA, Individuals, Weingarten	N4, W1
6	Whether the landfill gas management plan meets the requirements of §330.56(n).	NEEJA, Individuals, Weingarten	N5, W11

<sup>20</sup> Applicable only for "permit applications that were administratively complete before March 27, 2006."

	Issue	Requestors	Issues
7	Whether the landfill design will provide effective long-term slope stability.	NEEJA, Individuals, Weingarten	N7, W13
8	Whether the SOP provides for control of windblown solid waste and litter as required by §330.120.	NEEJA, Individuals	N8
9	Whether the Applicant's compliance history has been correctly considered in accordance with the requirements of Chapter 60.	Weingarten	W6
10	Whether the application's traffic data meets the requirements of §330.53(b)(9).	Weingarten	W8, W9
11	Whether the application adequately address the tracking of mud onto public roadways, as required by §§330.55(a)(2) and 127(a).	Weingarten	W9

If any of the hearing requestors write to the TCEQ and inform the TCEQ that they are not going to pursue their hearing request prior to the time at which the Commission meets to refer the issues, McCarty requests that any issues raised solely by those hearing requestors not be referred to SOAH.

Respectfully submitted,

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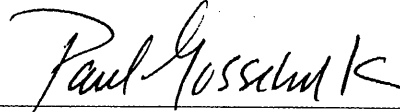
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**CERTIFICATE OF SERVICE**

I hereby certify that on this the 26<sup>th</sup> day of February, 2007, a true and correct copy of the foregoing Applicants' Response to Requests for Hearing was sent by hand-delivery or U.S. Certified Mail to the attached mailing list.

A handwritten signature in cursive script, reading "Paul Gosselink", written over a horizontal line.

Paul G. Gosselink

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PUBLIC OFFICIAL COMMENT:

The Honorable Mario Gallegos, Jr.  
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## EXHIBIT A

### **Issue 1: Whether the existing drainage patterns have not been significantly altered as required by §330.56(f)(4)(A)(iv) and Regulatory Guidance Document RG-417 (2002).**

The requestors question whether the development of the vertical expansion area will significantly increase stormwater run-off from the site. As discussed in Attachment 6A of the application, the vertical expansion includes significant improvements to the perimeter drainage system, including the construction of eight detention ponds. Stormwater will be collected in the detention ponds and released at a rate that is below the existing permitted peak flow rate.

As found in the application, McCarty demonstrated that the proposed expansion will not significantly alter natural drainage patterns and is consistent with the TCEQ guidance document RG417, "*Guidelines for Preparing a Surface Water Drainage Plan for a Municipal Solid Waste Facility*," 2002. A landfill expansion application, as noted in Section 3 of the guideline, must comply with §330.56(f)(4)(A)(iv) and §330.56(b)(5)(D) by comparing the existing peak flow, volume, and velocities to the those after the proposed expansion. After development of the proposed vertical expansion, the peak flows exiting each of Harris County Flood Control District's ("HCFCD") channels and leaving the permit boundary are less than the currently permitted conditions. The stormwater flow volume entering each HCFCD channel for both the existing permitted condition and the proposed vertical expansion condition are significantly the same. The actual volume leaving the site has no adverse impact on downstream drainage structures and this demonstration was submitted to the HCFCD in August 2003 and approved by the HCFCD in September 2003.

### **Issue 3: Whether the application is adequately protective of groundwater as required by §§330.200-206, and**

### **Issue 4: Whether the application is adequately protective of surface water as required by §330.55(b)(1)**

A number of hearing requestors expressed general concerns about McCarty's ongoing corrective action. The comments range from concerns about the release undergoing corrective action to questions about whether or not the vertical expansion will adversely impact the ongoing corrective action. Historically, corrective action for releases has been viewed as being separate and distinct from the permit process. As such, McCarty Road Landfill objects to a referral of a challenge to the corrective action, but does not object to referral of the groundwater and surface water issues as framed above.

There are no genuine issues of fact regarding the progress of the corrective action and remediation of the contamination at the landfill. In response to the original discovery of the contamination, a slurry wall system was installed and has proven effective in restoring the integrity of the contamination. The semi-annual and annual groundwater monitoring and corrective action reports submitted to the TCEQ in January 2007, demonstrate that remediation

of the contamination is nearing completion. The concentrations of the contaminants have decreased significantly and continue to decrease. Primarily only daughter / degradation products from the original contamination remain detectable in the groundwater and only three wells have any remaining detections of concentrations above primary drinking water MCLs. McCarty recently received approval from TCEQ for a pilot study to change the current enhanced bio-remediation program from an aerobic system to an anaerobic system in an effort to accelerate the clean up of the remaining low concentrations of COCs. The current monitoring data demonstrates that the plume is being effectively controlled and remediated but the proposed change to the system is designed to further speed final cleanup.

**Issue 5: Whether the application provides an odor management plan that complies with §330.125(b) and §330.133(a).**

Two requestors expressed concern that the proposed expansion would result in odor problems. The site uses and will continue to use a landfill gas (LFG) collection and control system (GCCS) to remove the LFG from within the landfill before it can reach the landfill surface. A detailed Odor Management Plan is included in the Site Operating Plan (Section 4.10.2). This Odor Management Plan clearly defines what measures will be maintained and added to control potential odors. To supplement in-place odor management practices and the operation of the GCCS, additional odor control measures that go beyond the requirements of the rules are being added. These include restrictions on the size of the working face during operating hours, minimization of the working face area during off-peak hours, the use of portable deodorizers, and the installation of a deodorizer curtain.

**Issue 6: Whether the landfill gas management plan meets the requirements of §330.56(n).**

The control and monitoring of LFG is addressed in the application in both the Site Operating Plan (Section 4.10.2) and Attachment 14 – Landfill Gas Management Plan. As stated in Issue No. 4, the control of LFG will be accomplished through the continued operation of the GCCS and the progressive expansion of the GCCS as the landfill develops. Extensive surface emission monitoring is performed every quarter. During this quarterly monitoring event, the entire landfill surface is monitored along a specified path to detect surface emissions of methane. If any surface emissions are detected above the regulatory threshold, remedial actions are immediately implemented. All results of the surface emissions monitoring are submitted to the TCEQ.

Also, the LFG flares are continuously monitored for gas flow and temperature, and the GCCS data is collected and submitted to the TCEQ semi-annually for review. In addition, the current potential emissions from the site have been submitted to the TCEQ and proper air authorization has been approved.

**Issue 7: Whether the landfill design will provide effective long-term slope stability.**

Most Texas landfills were permitted with landfill side slopes not exceeding 25% or 4(H):1(V). As noted in Attachment 7 of the application, the McCarty Road Landfill side slopes are designed

in compliance with 4(H):1(V) sideslopes; however, in this case, a detailed stability analysis was performed for the proposed expansion. Slope stability analyses were performed on all of the critical sections to evaluate the stability of the interim fill slopes and the slopes of the final landfill configuration. As stated in the application, the proposed interim and final cover slopes are stable with a safety factor of 1.63.

This settlement analysis addresses the settlement of the final cover system to demonstrate that the proposed final cover system is designed to withstand the potential strain induced by waste settlement. A settlement and strain analysis was completed and demonstrates that the final cover system will be stable as designed and maintain positive drainage. As noted in Section 3.5.3 in the application, the landfill final cover will be subject to a strain of 0.025%, which is much less than the allowable strain (0.5%).

**Issue 10: Whether the application's traffic data meets the requirements of §330.53(b)(9).**

A requestor raises general concerns about traffic that are addressed in the permit application. The requestor also asserts that the traffic study underestimated the traffic load on area access roads because the study did not account for trucks bringing soil from off-site sources to the landfill. This is based on an incorrect assumption that there is not sufficient soil in the borrow area to meet the soil needs of the landfill, including the vertical expansion area. In fact, there is sufficient soil available to meet the requirements of the landfill. Furthermore, this soil is transported to the working face and other landfill areas on private, internal access roads and the vehicles associated with this activity will not travel on public roads and will have no impact on the vehicle count provided in the application (e.g., Highway 90, Oates Road, Mesa Drive, and Interstate Loop 610).